

REPLY BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

15-3624

THOMAS E. WALKER

Appellant,

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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APPELLANT'S REPLY ARGUMENT

Even reading the Board's decision as a whole, the Board committed prejudicial legal error when it denied Mr. Walker's claim referral for extraschedular consideration. The Secretary's argument to the contrary are unavailing. Sec. Brief at 5-9; 9-11.

a. The Board improperly denied referral of the Veteran's tinnitus for extraschedular evaluation.

The Secretary concedes that the Board concluded that the rating criteria "considers all noise in the ear regardless of description (crickets, etc.), volume, or severity." Sec Brief at 6; R-7 (1-10). The Secretary also concedes that the Board's extraschedular analysis focused solely on the Veteran's tinnitus symptomatology. *See id.* Symptoms, however, are only one part of the *Thun* analysis. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub. Nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009). The Board is also required to consider whether the severity of the Veteran's disability is contemplated by his assigned rating. *See id*; *see also Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

Even if the Veteran suffers from ordinary *symptoms* contemplated by the schedular criteria, he may still satisfy the first *Thun* element if the severity of those symptoms are greater than what is contemplated by his assigned rating.¹ *Yancy*, 27 Vet.App. at 495 (holding the Board must "compare the veteran's symptoms with *the assigned schedular ratings*."). The corollary to the Board's conclusion that the tinnitus

¹ An argument that the symptoms of the Veteran's tinnitus are not contemplated adequately by the rating criteria will be provided in the follow paragraphs.

rating criteria contemplates any severity, is that without symptoms that are not contemplated by the rating criteria, a veteran can never demonstrate that referral for an extraschedular evaluation is warranted. This result is contrary to the law. *See Thun*, 22 Vet.App. at 115. *See also Yancy*, 27 Vet.App. at 495. Because of the Board's error, it failed to consider whether the severity of the Veteran's tinnitus was contemplated by the rating criteria and his assigned 10 percent rating. R-7. This was legally incorrect.

Further, the Board misinterpreted 38 C.F.R. § 3.321 (2016) when it found that the symptoms of the Veteran's tinnitus were contemplated by his 10 percent rating because he did in fact experience symptoms not contemplated by the rating criteria. Apa. Open Brief at 8-9. The Secretary provides a confusing response to this argument and improperly summarizes the Veteran's opening brief. Sec. Brief at 7. The Secretary provides no direct response to the argument the Veteran provided in the opening brief: that constant tinnitus is not contemplated by the tinnitus rating criteria, and because the Veteran has constant tinnitus his disability is not contemplated by the rating criteria. Thus, the Court may assume that the Secretary concedes this point. *See MacWhorter v. Derwinski*, 2 Vet.App. 133, 136 (1992) (Court noting that where the Secretary fails to respond appropriately, "the Court deems itself free to assume, and does conclude, the points raised by appellant, and ignored by the General Counsel, to be conceded.").

If this Court determines the Secretary has responded to that argument, his arguments are unpersuasive. The Secretary states, “Appellant further asserts that the plain meaning of the regulation refers to only non-constant duration of tinnitus symptoms, and Appellant’s symptoms are not non-constant, as it the only duration contemplated by the scheduler for rating tinnitus.” *Id.* As far as the Court finds the Secretary did respond to the Veteran’s argument, the Board simply did not consider whether the Veteran’s symptom of constant tinnitus, R-6, was contemplated by a rating criteria which only contemplates recurrent tinnitus. *Apa. Open. Brief* at 8-9. Recurrent is defined as “happening or appearing again and again,” which connotes that at some point the recurring event stops so it may be again. *Apa. Open. Brief* at 8.

The Secretary further states the Board’s “conclusion that Appellant’s sound of crickets and the level of the sound is plausibly based in the record[.]” *Sec. Brief* at 7. The Secretary goes on, “tinnitus is not limited to ringing, buzzing, roaring, or clicking, and here the Board appropriately determined that it was crickets.” *Id.* at 7-8. As far as this is an argument about the type of noise the Veteran hears, the type of noise he hears is not at issue in this case. *Apa. Open. Brief* at 7-9. The Veteran agrees that the level of the sound that he hears, which the Board conceded “extremely loud,” at a four out of five level with a five evidencing intolerable tinnitus, was plausibly based on the record. R-6. The Secretary concludes, “as explained by the Board, the level of noise is contemplated by the schedule for rating disabilities where the definition of

noise which is included within the definition of tinnitus includes the level of noise.” Sec. Brief at 8. Simply put, all levels of noise is not necessarily contemplated by the tinnitus rating criteria.

Finally, the Board’s use of the incorrect standard in adjudicating the second step of *Thun* is not harmless, contrary to the Secretary’s argument. Sec. Brief at 8-9. The Board’s failure to properly assess “the nature and severity of a claimant’s symptoms could affect the Board’s analysis of both the first and second *Thun* elements.” *Yancy*, at 494 n.5. Remand is required for the Board to adequately interpret 3.321 and at the very least provide an adequate statement of reasons or bases for its decision.

b. The Board improperly adjudicated whether the collective impact of all of the Veteran’s service-connected disabilities required referral.

The Secretary argues that whether the collective impact of all of the Veteran’s service-connected disabilities required referral for extraschedular consideration was not reasonably raised by the record. Sec. Brief at 9-11. The Secretary is incorrect. In this case, Mr. Walker is service connected not only for his tinnitus, but also for obstructive sleep apnea, PTSD, right chin and mandible sensory neuropathy, several disfiguring scars, a retained body in his cervical spine, bilateral hearing loss, and lost teeth. R-41 (37-43).

The Veteran was prejudiced by the Board’s error, as the record demonstrated that the collective impact of the Veteran’s multiple service-connected disabilities

impacted him in ways not contemplated by the schedular rating criteria. For instance, the Veteran's bilateral hearing loss disability was impacted by being in noisy situations. R-806 (806-08). The Veteran's tinnitus created a cricket like buzzing that is so loud it is almost intolerable. *Id.* The Board's lack of analysis on whether the Veteran's tinnitus impacted the Veteran's service-connected bilateral hearing loss is particularly problematic because the Veteran is service connected at a non-compensable level for his hearing loss. *See* R-41. The Board was required to discuss whether the combined impact of those two disabilities created a disability picture that was more disabling than a non-compensable and a 10 percent rating.

Further, the Veteran's bilateral hearing loss, which is impacted by noise (and his tinnitus is noisy) impacts his ability to work. Mr. Walker stated that he had difficulty hearing at work, which "create[d] a very stressful work environment." R-1170-71. He also indicated that his PTSD caused him to be unemployable when he filed a Form 8940. R-199-201. The Veteran's PTSD caused him to feel stressed when he worked as a correctional officer. R-201. The Veteran also stated that his PTSD caused him to have a lack of motivation at work and serious problems maintaining effective work relationships. R-660. By 2010, it was becoming very difficult for him to work with anyone. R-622 (622-23). Thus, the Board was required to determine whether the functional impact of the Veteran's tinnitus, bilateral hearing loss, and PTSD was more than what was contemplated by their already assigned schedular ratings. His hearing

loss and tinnitus impacted his ability to hear at work and his PTSD impacted him psychologically at work, rendering him unable to work with peers.

Based on that evidence of record, the Board should have determined that the record reasonably raised the issue of a collective impact from the Veteran's multiple service-connected disabilities were more disabling than when considered individually, requiring referral. It failed to do so and at no point in its decision did it even mention the Circuit's decision in *Johnson*. *Johnson v. McDonald*, 762 F.3d 1362, 1366 (Fed. Cir 2014) This constitutes a misinterpretation of section 3.321(b)(1), and renders the Board's statement of reasons or bases for its decision inadequate. On remand, the Board should be instructed to consider the combined effect of the Veteran's service-connected disabilities as reasonably raised by the record and evaluate the issue pursuant to *Johnson* and the plain language of 38 C.F.R. § 3.321(b)(1).

CONCLUSION

For these reasons, as well as those provided in the opening brief, remand is required. The Board erred when it misinterpreted 38 C.F.R. § 3.321 and provided an inadequate statement of reasons or bases for why the Veteran's tinnitus was contemplated by the rating criteria. The plain language of the rating criteria only contemplates recurrent, or non-constant tinnitus. Mr. Walker has constant tinnitus that is at a near intolerable level. Remand is required for the Board to appropriately interpret and apply 38 C.F.R. § 3.321.

Further, the Board failed to consider at all whether the collective impact of all of the Veteran's service connected disabilities required referral. The Veteran's bilateral hearing loss is effected by noisy situations. The Veteran's tinnitus is very noisy. The Board did not discuss at all whether the collective impact of these two service connected disabilities created an exceptional disability picture that warranted referral. Nor did the Board discuss whether the Veteran's PTSD and bilateral hearing loss, which both effected the Veteran's employability, created an exceptional or unusual disability picture and whether these two disabilities, were more disabling than each individually. Remand is required for the Board to consider where the collective impact of all of Mr. Walker's service-connected disabilities warranted referral.

Respectfully submitted,

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